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90-303

No. _____

In The

Supreme Court of the United States

October Term, 1990

LE BUP THI DAO, et al.,

Petitioner,

v.

BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether States and their agencies may be sued for damages under the Civil Rights Act of 1866, 42 U.S.C. section 1981?

2. Whether state officials sued in their individual capacities under the Civil Rights Act of 1871, 42 U.S.C. section 1983 for engaging in deliberate and unlawful discrimination, are immune from damages for all actions in their official capacities?

3. Whether declarations by individual defendants asserting that they acted in good faith and without discriminatory intent are sufficient to sustain a motion for summary judgment on the grounds of qualified immunity?

LIST OF PARTIES

The parties to the proceedings below were petitioners Dr. Le Bup Thi Dao, Dr. Tao Nguyen, Dr. Richard Le, and Dr. Sang Van Tran and respondents Board of Medical Quality Assurance of the State of California, Division of Licensing of the Board of Medical Quality Assurance, Credentials Committee of the Division of Licensing, Department of Consumer Affairs of the State of California, Kenneth Wagstaff, Dr. Galal Gough, Dr. Lindy Kumagai, Dr. John Lungren, Dr. James Magnall, Raymond Mallel, Audrey Melikian, Dr. J. Alfred Rider, and Dr. Jerome Unatin. The Committee for the Rights of Refugee Physicians in the United States was also a petitioner and real party in interest in the court below on the issues of declaratory and injunctive relief. Since the issues are not addressed in this petition, the Committee is not named as a party herein.

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BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

TO THE HONORABLE, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dr. Le Bup Thi Dao, Dr. Tao Trung Nguyen, Dr. Sang Van Tran, and Dr. Loc Phuoc Le, the petitioners herein pray that a writ of certiorari issue to review the opinion issued by the Court of Appeal of the State of California, First Appellate District, in the above-entitled case on February 26, 1990.

OPINIONS BELOW

The opinion of the Court of Appeal for the First Appellate District of the State of California is unreported and reprinted as Appendix I, p. App. 1. The initial opinion of the Court of Appeal for the First Appellate District is unreported and reprinted as Appendix II, p. App. 15. The order of the Superior Court of the City and County of San Francisco is unreported and reprinted as Appendix III, p. App. 32.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. sections 1981 and 1983, plaintiffs brought this action in the Superior Court of the City and County of San Francisco. On May 19, 1989, the Superior Court partially granted defendants motion for summary judgment holding that (1) the institutional defendants were subject to suit under 42 U.S.C. section 1981 and (2) the individual defendants were immune from suit by virtue of qualified immunity. (Appendix III, p. App. 32.) Both sides sought review by filing writs with the California Supreme Court. Review was granted and transferred to the Court of Appeal for the First Appellate District for alternative writs and hearing.

On January 5, 1990, the Court of Appeal issued its initial decision on the writs. The Court held that: (1) the institutional defendants could not be sued under either 42 U.S.C. sections 1981 or 1983 and (2) because of the "wealth of conflicting evidence" in the case, the individual defendants were not entitled to summary judgment

based on qualified immunity. (Appendix II, pp. App. 20-26.) Both sides petitioned for rehearing. The Court of Appeal denied both petitions, but granted rehearing on its own motion and treated the matter as submitted.

On February 26, 1990, the Court of Appeal issued its second opinion which is the subject of this petition. Relying on two decisions by this Court decided last term, the Court of Appeal disposed of petitioners' claims for damages against institutional and individual defendants as follows: (1) relying on *Jett v. Dallas Independent School District*, ___ U.S. ___ [109 S.Ct. 2702] (1989), the Court held that state agencies could not be sued for damages under either section 1981 or section 1983 and (2) relying on *Will v. Michigan Department of State Police*, ___ U.S. ___ [109 S.Ct 2304] (1989), the Court held that the individual defendants were absolutely immune from damages, since they were acting at all times in their official capacities. (Appendix I, pp. App. 6-9.)

A timely petition for review was denied by the California Supreme Court on May 17, 1990. On July 12, 1990, the Court of Appeal issued a Peremptory Writ of Mandate ordering the trial court to vacate its previous order and enter a new order in conformity with its opinion. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a).

STATUTES INVOLVED

42 U.S.C. Section 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and

Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. Section 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a civil rights action brought under 42 U.S.C sections 1981 and 1983 challenging the refusal of the Board of Medical Quality Assurance of the State of California and others to license Vietnamese physicians from 1986 to 1988. The petitioners are four graduates from the internationally recognized University of Saigon Medical

School. That school was the product of a unique experiment in international cooperation, run under the tutelage of American medical scholars and the aegis of the American Medical Association.

Petitioners each graduated from the medical school after the fall of Vietnam. They practiced for a short time in Vietnam before fleeing the country as refugees. In the United States, they each repeated their medical education as required by California law. They passed the required national examinations for English proficiency, basic scientific training and background, and for medical skill and training. After a thorough review of their credentials, each received permission from the State to enter post graduate training programs as interns and residents in hospitals.

Beginning in 1984, the Board of Medical Quality Assurance (the state agency which licenses physicians in California) began an investigation into Vietnamese doctors who left Vietnam prior to the fall of Saigon. That investigation uncovered no evidence of wrongdoing and no action was ever taken. However, using that investigation as a pretext, the Board abruptly suspended all further licensing of Vietnamese doctors as a class in early 1986.

On January 30, 1986, despite sending petitioners Le Dao and Tao Nguyen letters stating that they had passed all exams and training and had completed all of the requirements for licensure, the Board in closed session decided to suspend the licensing of all Vietnamese doctors regardless of training, skill, or any individual factors. In mid-1986, the Board began applying new standards to

petitioners as post-1975 graduates, based ostensibly on concerns about petitioners' documents and training.

Respondents have since conceded that their suspicions abut petitioners' documents and training were without foundation, and no investigation has ever established any fraud, impropriety, training gap or deficiency, or other basis for disqualifying *bona fide* Vietnamese graduates of an internationally recognized medical school. Indeed respondents finally licensed petitioners (and some thirty other post-1975 Vietnamese graduates) in 1988, pursuant to a special licensing and certification process established by the State Legislature over respondents' vehement opposition.

However, from 1986 to 1988, petitioners' lives were derailed by respondents' refusal to license Vietnamese physicians. As a consequence, they lost both job and training opportunities which they were offered and for which they were clearly qualified. The facts concerning the lead petitioner, Dr. Dao, are illustrative of the dilemma faced by petitioners during this period.

Dr. Dao was born and raised in the Republic of Vietnam, (commonly known as South Vietnam) as the eldest of nine children. In 1971, she was among 200 of 5,000 applicants selected to enter the University of Saigon Medical School. She completed her coursework in 1975 and residency in 1976 and 1977. Dr. Dao graduated in 1977, after which she practiced medicine at Cho Ray Hospital in Vietnam.

In March 1978, Dr. Dao fled Vietnam, leaving her family behind, as a refugee in a boat in open ocean. She eventually settled in Orange County, California where

she became fluent in English and became an American citizen in 1985. She also set out to fulfill all of the requirements for medical licensure in California. See, California Bus. & Prof. Code Sections 2100 *et seq.* In 1981, she passed the examination of the Educational Commission for Foreign Medical School Graduates. In 1982, she passed the national medical licensing FLEX examination. In 1984, she successfully completed a one-year internship at the University of California Irvine Medical Center, and in 1986, successfully completed a two-year residency there. In January 1986, Dr. Dao passed the oral examination for medical licensure in California.

On February 4, 1986, Dr. Dao received a letter from the Board of Medical Quality Assurance informing her that the only remaining requirements for issuance of her medical license were payment of $200 and a recent photograph. She promptly sent both to the Board, but did not receive her license. Instead, in response to her inquiries, she was told informally that the Board has suspended all licensing of Vietnamese physicians.

The Board's action forced Dr. Dao to withdraw from an offer to work as a physician at the Orange County Children's Hospital. At the time this action was filed, Dr. Dao was reduced to working as a lab technician, a position far below her training and qualifications as a physician.

From 1986 to 1988, petitioners' efforts to address the Board's concerns were both frustrating and unsuccessful. The evidence shows that, during this period, respondents were suspicious of all Vietnamese physicians. Respondents' suspicions were based on the belief that Vietnamese physicians should not be licensed because either

they were "communists" or, for some unknown reason, Vietnamese doctors were incompetent to practice medicine in California. These suspicions were without any factual foundation.[1]

For example, respondent Galal Gough, who served as the President of the Board, told a California State Senator that Vietnamese medical graduates "were trained by communists" and therefore their training "cannot be trusted."[2] During this period, respondent Gough repeatedly cited to an anonymous letter alleging that students at the University of Saigon Medical School were affiliated with the Communist Party.[3] He also expressed strong

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[1] For petitioners, the suggestion that they were "communists" or "members of the Communist Party" was a particularly bitter charge since their opposition to communism caused them to flee their country, where, in some cases, family members were imprisoned by the communist government. For example, after the fall of Saigon, Dr. Dao's father was placed in a prison camp.

[2] See, Declaration of Senator Royce at p. 2 in the record of this proceeding where the Senator states:

> "During a recess in the hearing, a person, who I later learned was Dr. Galal Gough, approached me and spoke with me regarding the post-1975 Vietnamese medical graduates. He told me the post-1975 Vietnamese medical graduates were "trained by communists" and that their training therefore "cannot be trusted.""

Dr. Gough's version of the same conversation is "I said we received information that stated that all applicants who were admitted to the universities after 1975 had to be a member of the Communist Party." Gough Deposition at p. 96.

[3] See, Minutes of BMQA, Division of Licensing Meeting of November 13-14, 1986 at p. 16; Gough Deposition at pp. 88-92.

doubts concerning the competency of Vietnamese doctors based on a single allegation that an unnamed Asian doctor from an unidentified medical school and country had difficulty with a medical procedure during training.[4]

Sentiments like these caused respondents to suspend the licensing of all Vietnamese physicians in 1986 and to continue that suspension even when there was no evidence to sustain it. Faced with the question from the head of the staff whether Vietnamese doctors would be licensed if an investigation cleared every credentials and training question, respondent J. Alfred Rider, who was then the President of the Division of Licensing answered "NO", and the matter was dropped without dissent from the other members.[5]

The evidence also shows that, during this same period, members of the Board were taking extraordinary steps to grant favorable treatment to license non-Vietnamese friends and acquaintances. For instance, Licensing Division President Rider repeatedly pressed the division to license a graduate from Guadalahara who was performing work in his office. The applicant had

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[4] *Id.* Gough Deposition at p. 93. That respondent Gough was deeply suspicious of all Vietnamese doctors was known to staff members. For example Mark Grimm, who was the chief staff person for the Vietnamese matter, describes Dr. Gough as being "very suspicious" of Vietnamese doctors. Grimm Deposition at pp. 133 and 261. Mr. Grimm attributes that suspicion to respondent's general suspicion of "Communist regimes" combined with Dr. Gough's "unusual experience" as a Marine Corps doctor in the Vietnam War some 20 years before. Grimm Deposition pp. 132-133 and 261.

[5] Grimm Deposition at pp. 294-295.

deficiencies in his training, his documentation, and his clinical rotations.[6] Throughout 1986 and 1987, respondent Rider pressed for the applicant's licensure, despite warnings from the Attorney General and his staff's assessment that the applicant was "totally unqualified to be licensed."[7] Over the staff's objections, the applicant was eventually granted a license.

Similarly, Board President Gough held a private meeting with an Iranian refugee who had documentation problems and was one of the few persons to fail the oral examination. Respondent Gough ordered the staff to admit the applicant to the next exam, even though he was not eligible. Dr. Gough then personally appeared at the exam site unannounced, pulled the applicant out of line, told the staff he was giving the exam himself, took the applicant into a room without the required second

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[6] In his sworn declaration Mark Grimm describes the applicant as follows: "One of the bottom ten percent of the class types. Doesn't have a Fifth Pathway. Doesn't have a real residency." Grimm Declaration at p. 139. He is "missing documents; he's missing components of his education." *Id.* at 146. "Totally unqualified to be licensed in this state. . . . " *Id.* at 139. Mr. Grimm also states "Vietnamese who were being held up for licensure are without question more qualified than [applicant]. You just can't deny that fact." Grimm Deposition at p. 271.

[7] See, Grimm Deposition at pp. 140-146, 266, 270-273, 278 and 473.

proctor, and reemerged minutes later to pronounce the applicant as passed and eligible for licensure.[8]

While respondents gave favored treatment to non-Vietnamese applicants they continued to refuse to license petitioners and other qualified Vietnamese physicians. Indeed, at a December 1986 meeting, where Dr. Rider stated that he would not license the Vietnamese doctors even if an investigation dispelled all concerns, the application of the Guadalahara graduate was again considered at Dr. Rider's request.[9]

Finally, in 1988, pursuant to reforms enacted by the California Legislature, a panel of experts reviewed the

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[8] Mr. Grimm states:

> "[The staff was] there to complain about what had happened at the exam and what had happened is that the Iranian was in a queue of 20 people to be randomly assigned to the next available Commissioner, and Dr. Gough showed up at the exam, saw the individual standing in the queue, went over and got him, brought him back to the counter where they do the scheduling and so forth, and advised the staff that this individual would not be taking the regular exam, that he would be doing the examination himself personally, and they went off down the hall to a room somewhere, and about 20 minutes came back and as he walked by Dr. Gough said, 'he passed.' "

Mr. Wheaton: "This is what your staff related?"

Mr. Grimm:

> "This is what they related to me. . . . This shouldn't have happened, and it was wrong."

Grimm Deposition at p. 265-266. The Attorney General's office called the action "totally inappropriate" and the exam results "invalid", but to no avail. *Id.* at 266.

[9] Grimm Deposition at p. 274.

curriculum for the University of Saigon Medical School and found that it met all of the requirements for licensure in California. The expert panel then reviewed the credentials for each Vietnamese applicant to determine whether they had attended the school, passed all exams and graduated.

Dr. Dao was among the first to be reviewed by the panel which found that she met all requirements for medical licensure in California. She received her license in March 1988 over two years after first being told by the Board that she had passed all exams and needed only to send in $200 and a recent photo.

Petitioners brought this action in Superior Court of the County of San Francisco in May 1987 against the Board of Medical Quality Assurance, its Division of Licensing, its Credentials Committee and the Department of Consumer Affairs. Also named as defendants were certain members and staff of the Board (including respondents Gough and Rider) each of whom were sued in their individual and official capacities.

Discovery was conducted in 1988 and 1989 and the matter was set for trial on March 20, 1989. After the trial was continued because of lack of a courtroom, defendants moved for summary judgment. On May 19, 1989, the court partially granted defendants motion for summary judgment holding that (1) the institutional defendants were subject to suit under 42 U.S.C. section 1981 and (2) the individual defendants were immune from suit by virtue of qualified immunity. (Appendix III, p. App. 32.) Both sides sought review by filing writs with the California Supreme Court. Review was granted and transferred

to the Court of Appeal for the First Appellate District for alternative writs and hearing.

On January 5, 1990, the Court of Appeal issued its initial decision on the writs. The Court held that: (1) the institutional defendants could not be sued for damages under either 42 U.S.C. section 1981 or section 1983 and (2) because of the "wealth of conflicting evidence" in the case, the individual defendants were not entitled to summary judgment based on qualified immunity. (Appendix II, pp. App. 20-26.) Both sides petitioned for rehearing. The Court of Appeal denied both petitions, but granted rehearing on its own motion and treated the matter as submitted.

On February 26, 1990, the Court of Appeal issued its second opinion which is the subject of this petition. Relying on two decisions by this Court decided last term, the Court of Appeal disposed of plaintiffs' claims for damages against institutional and individual defendants as follows: (1) relying on *Jett v. Dallas Independent School District*, ___ U.S. ___ [109 S.Ct. 2702] (1989) the Court held that state agencies could not be sued for damages under either section 1981 or section 1983 and (2) relying on *Will v. Michigan Department of State Police*, ___ U.S. ___ [109 S.Ct. 2304] (1989) the Court held that the individual defendants were absolutely immune from damages, since they were acting at all times in their official capacities. (Appendix I, pp. App. 6-9.) Reviewing the evidence the Court stated "Defendants submitted considerable, uncontradicted, evidence in support of their claim that an undisputed material fact was that the 'Individual defendants . . . were at all times material to this matter state officials acting in their official capacity under color of state law.' " *Id.*

A timely petition for review was denied by the California Supreme Court on May 17, 1990. On July 12, 1990, the Court of Appeal issued a Peremptory Writ of Mandate ordering the trial court to vacate its previous order and enter a new order in conformity with its opinion.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Determine Whether the State Court Properly Interpreted and Applied *Jett v. Dallas Independent School District* ___ U.S. ___ [109 S.Ct. 2702] (1989).

The Court of Appeal held that *Jett v. Dallas Independent School District*, ___ U.S. ___ [109 S.Ct. 2702] (1989) precludes any action for damages against a state or its agencies under 42 U.S.C. section 1981. In so doing, the state court went far beyond this Court's holding in *Jett*.

In *Jett*, this Court addressed whether section 1981 provides an independent federal cause of action for damages against *local* governmental entities. The Court held that there was no cause of action under that section. Important to the Court's decision was the fact that local governments could be sued for damages under section 1983.

Writing for the plurality, Justice O'Connor makes clear that where Congress has not acted to establish an alternative "remedial scheme" under section 1983, courts are compelled to find a cause of action for damages under section 1981. Concerning actions against private defendants where the Court has implied a damages remedy, Justice O'Connor states:

> In the context of the application of Section 1981 and Section 1982 to private actors, we "had little choice but to hold that aggrieved individuals could enforce this prohibition *for there existed no other remedy to address such violations of the statute.*"

109 S.Ct. 2270 (citations omitted, emphasis original).[10]

The Court of Appeal ignored this important limit to *Jett*. Instead, the state court extended *Jett* to bar damage actions against state entities under section 1981 even when no relief is available against state entities under section 1983. See, *Will v. Michigan Dept. of State Police*, ___ U.S. ___ [109 S.Ct. 2304] (1989) (State is not a "person" subject to suit under section 1983.). The Court of Appeal states:

> Plaintiffs invoked section 1981 solely in connection with one of their claims for damages alleged in their complaint. Less than a year ago the United States Supreme Court held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." (*Jett v. Dallas Independent School Dist.*, (1989) ___ U.S. ___ (109 S.Ct. 2702, 2721-2722.) A further difficulty is that section 1983 does not apply to claims against a State. (*Will v. Michigan Dept. of State Police, supra*, at p. ___ [109 S.Ct. 2304 at pp. 2307-2308, 2312];

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[10] The dissenting opinion observes "The Court's *primary reason* for distinguishing between private and governmental conduct under § 1981 appears to be its impression that, because private conduct is not actionable under § 1983, we had "little choice" but to hold that private individuals who violated § 1981 could be sued directly under § 1981." 109 S.Ct. at 2730 (emphasis added).

see *Pyne v. Meese*, (1985) 172 Cal.App.3d 292, 401-403.)

Appendix I at p. App. 7. Contrary to *Jett*, the state court has precluded petitioners from seeking damages under *both sections 1983 and 1981*. This overexpansive reading of *Jett* bars petitioners and other persons who are injured by state deprivation of their civil and constitutional rights from obtaining damages under both civil rights statutes.

This Court has long recognized that damages in civil rights actions are "a vital component . . . for vindicating cherished constitutional guarantees." *Owen v. City of Independence* 445 U.S. 622, 651, *reh'g denied*, 446 U.S. 993 (1980). Damage awards are "intended not only to provide compensation to the victims of past abuses, but [also] to serve as a deterrent against future constitutional deprivation as well." *Id.*

This Court has specifically recognized that damages are of particular importance when the government acts to deprive persons of their civil rights. As the Court explained in *Owen*,

> How uniquely amiss it would be, therefore, if the government itself – "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" – were permitted to disavow liability for the injury it has begotten. A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it had transgressed.

445 U.S. at 651 (citations omitted). Concerning the deterrent effect of damage awards for civil rights violations, this Court stated

> The knowledge that a municipality will be liable for its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials each of whom may be acting in good faith.

445 U.S. at 651-652.

These principles are fully applicable to this case. Petitioners came to the United States because they believed that (unlike the regime they were fleeing) our government promoted liberty, justice, and fair and equal treatment under the law. Instead of protecting these rights, the state agency regulating the practice of medicine in California considered petitioners and all doctors who fled Vietnam "communists", untrustworthy, and incompetent. For over two years, the Board of Medical Quality Assurance blocked the licensing of all Vietnamese trained doctors based on prejudice, rumor, and personal suspicion.

During this period, petitioners suffered the types of injuries that are clearly compensable in civil rights

cases.[11] Because of the Board's refusal to license Vietnamese doctors, petitioners were forced to give up jobs, internships, and other positions which they were offered and for which they were unquestionably qualified.

If the Court of Appeal's decision is allowed to stand, the State of California would be free to disavow liability for the injuries it has caused. While injunctive relief is still available under section 1981, an injunction would do little more than order the offending agencies to "Go and sin no more." Under those circumstances, state officials would have little incentive to detect, investigate, curb or prevent racially discriminatory action aimed against minority groups.

The Court should grant certiorari in this case to clarify its holding in *Jett*. While a close reading of that decision reveals that courts must find a cause of action for damages under section 1981 where no alternative remedy exists under section 1983, it is apparent that lower courts are erroneously interpreting the plurality's use of the term "state governmental units" to bar damage suits against the state agencies as well as local governmental agencies. Decisions like those of the Court of Appeal foreclose any damage remedy against the state under both section 1981 and section 1983. This is well beyond the holding in *Jett* and contrary to the Court's reasoning in that decision.

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[11] In addition to monetary losses, courts now hold that victims of racial discrimination can recover damages for emotional distress. See e.g., *Flanagan v. Aaron E. Henry Community Center*, 876 F.2d 1231 (5th Cir. 1989).

II.

The Court Should Grant Certiorari to Clarify the Use of Qualified Immunity after *Will v. Michigan Dept. of State Police*, ___ U.S. ___ [109 S.Ct. 2304] (1989).

As a second, independent issue, the Court of Appeal erred in failing to apply the qualified immunity doctrine to the respondents sued in their individual capacity. In two brief paragraphs, the Court of Appeal held that the qualified immunity doctrine no longer applies to state officials after *Will*.

A. The Court of Appeal's interpretation of *Will* is Wrong as a Matter of Law.

Over the last decade, the United States Supreme Court has carefully constructed an analytical framework for determining when public officials may be sued in their individual capacities for their conduct in office that transgresses statutory or constitutional boundaries. The mode of analysis has been summarized as follows:

> Some officials, such as judges, prosecutors, and legislators are generally protected by absolute immunity, while most administrative and executive officials are protected by a qualified good faith immunity. The absolute immunity "bars a suit at the outset and frees the defendant official of any obligation to justify his action," while qualified immunity is in the nature of an affirmative defense and protects an official from liability only if he can show that his actions did not contravene clearly established statutory or constitutional rights of which a reasonable person in his position would have known.

Schwartz and Kirkin, *Section 1983 Litigation: Claims, Defenses, and Fees*, § 7.2, p. 143.

The principal cases concerning qualified immunity are *Anderson v. Creighton*, ___ U.S. ___ [107 S.Ct. 3034] (1987) and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) [102 S.Ct. 2764]. These cases strike a careful balance between permitting individuals to vindicate their rights, while allowing summary judgment to permit public officials to avoid frivolous suits. *Anderson* and *Harlow* require that lower courts determine whether the actions of executive or administrative officials sued in their individual capacity "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson, supra*, ___ U.S. ___ 107 S.Ct. at 3038 "Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action turns on the "objective legal reasonableness" of the action." *Id.*

In this action, plaintiffs sued the individual defendants in their "individual and official capacities."[12] Relying on *Will*, the Court of Appeal discarded the entire qualified immunity doctrine carefully established by this Court. The Court of Appeal broadly construed *Will* to foreclose any action against state officials "acting in their official capacities." The court stated

> In their petition (A046132) plaintiffs ask us to overturn the determination by respondent court that the individual defendants enjoy immunity from plaintiffs' damage claims. To continue the theme developed in part I, that

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[12] See, Plaintiffs' Second Amended Complaint of Course, filed on August 26, 1987 p. 8 (emphasis added) ("The individual defendants who are members of the organizational defendants are as follows: . . . Each is sued in his or her *individual* and official capacities."

> determination has been vindicated by recent developments from the United States Supreme Court. Insofar as respondent court's determination found against plaintiffs on their claim based upon 42 U.S.C. section 1983, that ruling is invulnerable for a reason which could not be anticipated by either the court or the parties. In *Will v. Michigan Dept. of State Police, supra,* ___ U.S. ___ (109 S.Ct. 2304 at pp. 2311-2312), the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" and therefore cannot face liability for damages. Lesser federal courts have reached the same conclusion with respect to sections 1985 and 1986. (See *Coffin v. South Carolina Dept. of Social Services,* (D.S.C. 1983) 562 F.Supp. 579, 585-586 and authorities cited.)

Appendix I, at pp. App. 7-8.

This is a misreading of the holding in *Will.*

In *Will,* the defendant, Director of State Police was sued *only in his official capacity.*[13] Consequently, there was no reason for the Court to apply the qualified immunity doctrine established in *Harlow* and *Anderson.* The Court was merely asked to determine whether a state agency and its officials sued in their official capacity were "persons" under Section 1983. The Court held that they were not. The Court stated that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . [and as such,] it is no different from a suit against the State itself." 109 S.Ct. at 2311. Since it held that the latter is not permitted under section 1983, the Court further held that

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[13] "Named as defendants were the Department of State Police and the Director of State Police in *his official capacity,* also as a respondent here." 109 S.Ct. at 2306 (emphasis added).

an official-capacity suit against a state official under section 1983 is also not permitted. *Id.*

Unfortunately, in the last paragraph of its opinion, the Court stated

> We hold that neither a State nor its officials *acting* in their official capacities are "persons" under section 1983.

109 S.Ct. at 2312 (emphasis added). Despite the facts in *Will* limiting its holding to cases where state officials are sued in their official capacities, the Court of Appeal seized on the use of the word "acting" in the above sentence to extend an absolute immunity to state officials whether they are sued in their official capacity or not. Appendix I at pp. App. 7-8.

Nor is the Court of Appeal the only court finding the use of the word "acting" confusing. In *Kolb v. State of Ohio Dept. of Mental Ret. & Dev.*, 721 F.Supp. 885, 895 (N.D. Ohio 1989), the defendants similarly argued based on *Will* that "state officials sued in their individual capacities are still immune from suit as long as they were acting in their official capacities." There, the District Court held that the defendants were not entitled to such immunity. The court stated:

> The court finds that the Supreme Court did not intend to adopt the "ultra vires" theory advanced by the defendants. If such were the case, the Court would have effectively overruled several of its prior decisions and established a new and completely unqualified requirement for pleading section 1983 actions against state officials in their individual capacities. This is something the Supreme Court would not undertake lightly, and it is thus the opinion of this Court that the Supreme Court intended no such thing."

Id. at 897.

The District Court then went on to explain that the qualified immunity doctrine was applicable.

> Thus the defendants' argument quite simply misstates the law. State officials who commit constitutional torts cannot invoke the state's sovereign immunity as an absolute defense to a subsequent civil rights lawsuit against them. Otherwise, it would be virtually impossible to bring a section 1983 claim against a state actor in federal court. However, though they are not entitled to the absolute immunity of the Eleventh Amendment, certain state officials are entitled to qualified or good faith immunity.

Id. at 898. With regard to *Will*, the District court stated "The use of the word "acting" instead of the phrase "sued in" [in the last sentence of *Will*] *will certainly cause much confusion in future applications of this holding.*" *Id.* at 898 (emphasis added).

In the instant case, confusion over the meaning of *Will* caused the California Court of Appeal to dismiss petitioners' legitimate claims for damages against the individual respondents under section 1983. Similar confusion by lower courts (especially state courts which lack experience in civil rights cases) will cause other plaintiffs to be wrongly denied this remedy.

B. The Court of Appeal's Review of the Factual Record is Founded on its Erroneous Interpretation of *Will*.

Following its erroneous interpretation of *Will*, the Court of Appeal reviewed the record to determine whether the individual defendants "were acting in their official capacities." The Court stated

> Defendants submitted considerable, uncontradicted evidence in support of their claim that an undisputed material fact was that the *"Individual defendants . . . were at all times material to this matter state officials acting in their official capacities under color of State law."* Those defendants can therefore face no liability for monetary damages as to sections 1983, 1985, and 1986.

Appendix I, at p. App. 8 (emphasis added). In fact, under the qualified immunity doctrine, the issue before the Court should have been whether, in construing the facts in a manner most favorable to the plaintiffs, the individual defendants' knew or should have known that their refusal to license Vietnamese doctors violated clearly established law.

In this case, the motion for summary judgment was made by defendants' after extensive discovery by both sides. Consequently, there is an abundance of evidence concerning the actions of the individual respondents' and their motives therefore.

The basis for petitioners' claims is contained in a voluminous record, drawn from respondents' own depositions, documents of the Board, several sworn declarations and the deposition of the former head of the Board's licensing division who was disgusted with the Board's treatment of the applicants, and the sworn declaration of a State Senator who was told by a defendant why they were not going to license the Vietnamese. In brief, the record reveals:[14]

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[14] It is important to not that while plaintiffs have relied on the testimony of defendants and other parties in concert with them, and on defendants' documents revealed in discovery, to

(Continued on following page)

1. Respondents treated petitioners as a class of persons, defined solely by their status as Vietnamese, in denying them licenses and imposing unique licensing requirements upon them;

2. Respondents on three separate occasions in 1986 met in closed session, without legally required notice before or after the meeting, to discuss petitioners, and there decided to "suspend" licensing of petitioners, despite lacking any evidence of any impropriety, and without any opportunity for petitioners to be heard or present any proof to rebut defendants' concerns;

3. Respondents on several occasions throughout 1986 and 1987 refused to accept any individualized materials from petitioners and insisted that as a class, they all were equally unqualified; however, when petitioners established their collective credentials by compiling data from refugee faculty and deans, respondents then refused to accept generic information and demanded individualized original documents from the government of Vietnam and established requirements their own licensing program manager has testified "made no sense";

4. Respondents expressed their antipathy toward all Vietnamese in closed sessions, as revealed by the testimony of former staff and handwritten notes of the meetings, including an expression of one defendant's "*great* reservations" about and "suspicions" of the Vietnamese,

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(Continued from previous page)

establish their case, defendants' *sole evidence* in the trial court was self-serving declarations of defendants and their employees prepared for the Motion for Summary Judgment that simply disclaimed any discriminatory intent.

unfounded in fact, but later attributed to his service in Vietnam 20 years before;

5. Individual respondents expressed racist sentiments regarding the Vietnamese, including one respondent who told a State Senator that the petitioners "were trained by communists" and therefore could not be trusted;[15]

6. Respondents on another occasion based their refusal to license on one anonymous allegation about a single Asian from an unidentified school and country whom he once observed having trouble with a single procedure during training;

7. At the same meeting, respondents justified their refusal to license by citation to an anonymous letter, never verified, alleging that students at the medical school in Vietnam after 1975 were affiliated with the Communist Party;

8. At a later meeting, faced with the question from the head of the staff whether the Vietnamese would be licensed if an investigation cleared every credentials and training question, the President of the Licensing Division answered "NO", and without dissent from fellow members the matter was dropped;

9. Respondents cloaked this discrimination in shifting and ad hoc licensing procedures, such as "reconsideration" before the same subcommittee that denied

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[15] The State Senator, Senator Edward Royce, was so appalled by defendants' conduct that he authored the legislation that allowed plaintiffs to be licensed through a credentialing process that forced defendants to accept documents and training certified as authentic by a panel of experts. California Bus. & Prof. Code section 2122.

licensure in closed sessions, at which the applicant was never permitted to attend, rebut concerns, be heard, or present evidence. In fact, the former head of licensing testified that "reconsideration" was a fiction.

At the same time that Vietnamese doctors were subjected to this treatment, less qualified non-Vietnamese applicants were afforded accelerated procedures and had requirements waived, as respondents disregarded credentials and gaps in training, and personally interceded in the licensing process to override adverse staff decisions.

Most notorious was a friend of the President of the Licensing Division, a respondent here, who at the very same closed meeting where he stated that the Vietnamese would never be licensed regardless of their credentials, insisted that a foreign medical graduate (an American who had graduated from a medical school in Mexico), be licensed although his file revealed legitimate licensing concerns. Nor was this the only instance of respondents' unequal treatment toward similar classes of persons. As discussed above, respondents acted to grant favorable treatment to other less qualified non-Vietnamese applicants as well.

Given the facts of this case, there is no question that respondents knew or should have known that their refusal to license Vietnamese physicians as a class was unlawful. When racial or ethnic animus forms the basis for official acts, public officials are manifestly charged with knowledge of violation of clearly established law. In *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980) *cert. denied* 449 U.S. 875, plaintiffs charged that city officials delayed issuance of liquor licenses to them by filing protests motivated by racial or ethnic animus. The Ninth Circuit rejected defendants' qualified immunity defense and

affirmed the award of damages. Writing for the Court, then-Circuit Judge Anthony Kennedy stated

> No official can in good faith impose discriminatory burdens on a person by reason for a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it.

617 F.2d at 1392

From this record, respondents' motion based on qualified immunity should have been denied. Indeed, denial was the initial decision of the Court of Appeal which was later vacated. In that initial decision, the Court of Appeal engaged in a lengthy discussion concerning the doctrine of qualified immunity as it applied to the individual respondents in this case. Appendix II, pp. App. 23-26. The Court concluded that granting summary judgment based on that doctrine was improper "because the parties submitted a wealth of conflicting evidence concerning [the] material issue" of respondents' discriminatory motives and intent. Appendix II, at p. App. 26.

Owing to the Court's misinterpretation of *Will*, the discussion concerning qualified immunity is completely absent in the Court's second opinion. Instead, as quoted above, the Court merely states that the individual respondents "were acting in their official capacities" and, therefore, are immune. Thus, by misreading *Will*, the Court of Appeal erred in its review of the record. That record shows that petitioners were discriminated against because of their Vietnamese status while less qualified non-Vietnamese applicants were granted favored treatment by respondents.

This Court has granted certiorari to determine whether state courts have properly interpreted, applied or extended a prior Supreme Court decision in a given situation. Stern, *et al.*, *Supreme Court Practice*, Sixth Edition, Section 4.26, p. 238 and cases cited therein. It has also granted certiorari, despite absence of a conflict, when state court decisions involve the construction and application of federal statutes and the questions raised are sufficiently important. *Id.*

Recently, this Court reaffirmed the importance of concurrent enforcement of the federal civil rights laws in state and federal courts. Writing for a unanimous court, in *Howlett v. Rose*, ___ U.S. ___ [110 S.Ct. 2340, 2438] (1990), Justice Stevens stated:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might be true – but because the Constitution and the laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular mode of procedure.

Based on this principle, the Court held that state courts could not extend the mantle of sovereign immunity to "persons" who would otherwise be subject to § 1983 liability. 110 S.Ct. at 2447. Here, as in *Howlett*, the Court should grant certiorari to prevent the states from nullifying an important remedy afforded all citizens under the federal civil rights laws.

CONCLUSION

For these reasons set forth above, this petition for certiorari should be granted. If the misreading of *Jett* and *Will* is allowed to stand, plaintiffs will be denied a damage remedy against state entities and individual defendants under both sections 1981 and 1983. This sweeps far beyond the holding in those decisions and denies plaintiffs an important remedy under the civil rights laws.

In this case, petitioners have produced ample evidence to show that, from 1986-1988, they and other Vietnamese physicians were denied medical licenses because of bias, prejudice and unfounded suspicion by respondents. Based on this evidence, petitioners should be allowed the opportunity to go to trial and obtain the relief they seek.

Respectfully submitted,

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August 14, 1990

APPENDIX I

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEALS OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

LE BUP THI DAO et al.,

Real Parties in Interest.

_____/

FILED
FEB 26 1990
Court of Appeal
First App. Dist.
By RON D.
BARROW, Deputy

A046101
(San Francisco
Super. Ct. No.
876321)

LE BUP THI DAO et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Real Parties in Interest.

_____/

A046132
(San Francisco
Super. Ct. No.
876321)

A class action challenging alleged discriminatory licensing practices of the Board of Medical Quality Assurance (BMQA) has produced these petitions demonstrating that virtually everyone involved objects to some aspect of a pair of orders made by respondent court in connection with a motion for summary judgment.[1] For the reasons hereinafter developed, we determine that only one group of parties has some entitlement to relief.

BACKGROUND

The underlying action was initiated by four Vietnamese graduates of the University of Saigon Medical School, joined by the Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States (the Committee).[2] The named defendants were the

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[1] In light of the multiplicity of petitioners and real parties in interest, the parties' trial court designations as plaintiffs and defendants will in the interests of simplicity and clarity be employed throughout this opinion.

[2] With respect to the Committee the complaint alleges it "is an unincorporated association headquartered in Orange County, California. The Committee has filed for incorporation as a non-profit corporation under the laws of the State of California and the matter is pending. The Committee has a dues paying membership of approximately 100 Vietnamese refugees. Said membership is composed of licensed physicians and applicants for medical licensure throughout the United States. The [C]ommittee's organizational purpose is to ensure that its members are provided full and equal access to professional training, employment and licensure in the medical field."

An additional named plaintiff, Catholic Community Services, was dropped as a party plaintiff prior to the summary judgment motion.

BMQA, its Division of Licensing and its Credentials Committee; the Department of Consumer Affairs as "the duly organized and constituted parent agency of BMQA"; and various individuals who occupy official positions with these entities.

The introductory allegations of the complaint provide an overview: "This action is a class action on behalf of foreign medical school graduates from Vietnam ("FMGs") who have been unlawfully denied a license to practice their profession in California by the discriminatory, illegal, arbitrary and unfounded actions of . . . (BMQA) and certain of its members and employees. . . . [¶] BMQA has been and remains engaged in acts and practices to artificially and invidiously deprive large numbers of FMG applicants of a California medical license without regard to competency standards and for anti-competitive, discriminatory and other improper purposes. These acts, many of which are unlawful in and of themselves, include the conduct of secret meetings with agents of the California[] Medical Association and others, discriminatory use of statutory criteria for licensure, falsifying minutes of meetings and other official documents, fabrication of nonexistent criteria for licensure, failure and refusal to follow statutory mandates, avoidance of required administrative procedures, unfounded charges against applicants and refusal to deal fairly and forthrightly with applicants." More particularly, plaintiffs alleged that (1) "defendants at a closed meeting on January 30-31, 1986 decided to suspend processing of all applications for licensure from persons who graduated from Vietnamese medical schools before or after 1975," and (2) at a meeting conducted on June 25-26,

1987, "defendants announced that no post-1975 Vietnamese graduate would receive a license" until such persons "fulfill[ed] new requirements for licensure," thereby "violat[ing] both the California Administrative Procedure Act and the California Open Meeting Law."

Based upon these general allegations, and additional allegations detailing the treatment the four individual plaintiffs received from defendants, plaintiffs set forth causes of action seeking (1) damages and injunctive relief for violation of the Fourteenth Amendment's guarantees of equal protection and due process (2) damages for violation of 42 U.S.C. section 1981 (3) damages for violation of 42 U.S.C. section 1983 (4) damages for violation of 42 U.S.C. section 1985 (5) damages for violation of 42 U.S.C. section 1986 (6) damages for violation of the Administrative Procedure Act (Gov. Code, § 11340 et seq.) and (7) declaratory and injunctive relief for violation of the Open Government Act (Gov. Code, § 11120 et seq.). The substantive portion of the complaint concluded with an omnibus cause of action for declaratory and injunctive relief based upon all matters "hereinbefore alleged."[3]

In due course defendants moved for summary judgment or summary adjudication of issues. The grounds for the motion relevant to these proceedings were that (1) "Plaintiff Committee has no standing to assert the constitutional rights of the individual plaintiffs" (2) "Certain issues and claims in this matter are now moot" and (3)

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[3] Additional causes of action seeking damages for violation of the Unruh Civil Rights Act (Civ. Code, § 51) and the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.) were subsequently dismissed by plaintiffs.

"By reason of immunity, defendants are not liable for suit for violation of 42 U.S.C. sections 1981, 1983, 1985 or 1986." As part of their motion defendants also sought an award of costs, including attorneys fees, pursuant to 42 U.S.C. section 1988.

After receiving voluminous papers, prodding the parties into narrowing the areas of dispute by stipulation, and conducting two hearings on the motion, respondent court made two orders (both filed on May 19, 1989) in which it ruled that (1) pursuant to stipulation plaintiffs' claims based upon 42 U.S.C. section 1983, 1985, and 1986, were dismissed as against the institutional defendants (2) by reason of a split of authority the institutional defendants were not entitled to summary judgment on the claim based upon 42 U.S.C. section 1981 (3) the individual defendants were clothed with "qualified immunity" against all of plaintiffs' claims (4) the Committee had standing but only to pursue claims for declaratory and injunctive relief, not damages, by reason of the enactment of Business and Professions Code section 2122, and (5) "[n]o other issue has been properly presented for summary adjudication."

Unhappy with these determinations, plaintiffs and defendants each filed a petition for extraordinary mandamus relief. Alternative writs were issued.

REVIEW

Our usual practice in dealing with situations where both sides are unhappy with trial court rulings, orders, or judgments is to deal with the points raised by one side before progressing to the points urged by the other side.

With these petitions, however, we have determined that the most logical analytical progression requires some interlineation of the contentions advanced by the parties.

I

We first turn to defendants' petition (A046101). Respondent court ruled, and plaintiffs do not dispute, that the state agencies named in the complaint have immunity from suit for purposes of 42 U.S.C. sections 1983, 1985, and 1986. The ruling that comparable immunity did not extend to section 1981 was correct. (See *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1035, fn. 12.) Defendants' elaborate arguments to the contrary are not persuasive because they are founded on considerations derived from application of the Eleventh Amendment to actions commenced in federal court. But the Eleventh Amendment does not apply to actions brought in state courts. (See *Will v. Michigan Dept. of State Police* (1989) ___ U.S. ___ (109 S.Ct. 2304, 2307).)

Yet although defendants may have lost this battle, plaintiffs cannot win the war. Plaintiffs invoked section 1981 solely in connection with one of their claims for damages alleged in their complaint. Less than a year ago the United States Supreme Court held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." (*Jett v. Dallas Independent School Dist.* (1989) ___ U.S. ___ (109

S.Ct. 2702, 2721-2722).)[4] A further difficulty is that section 1983 does not apply to claims against a State. (*Will v. Michigan Dept. of State Police, supra,* at pp. ___ [109 S.Ct. 2304 at pp. 2307-2308, 2312]; see *Pyne v. Meese* (1985) 172 Cal.App.3d 292, 401-403.) What defendants choose to do with these recent holdings – which were issued after respondent court made its ruling – is up to them. All we can say at present is that no error occurred when the immunity claim by the institutional defendants was rejected.

II

In their petition (A046132) plaintiffs ask us to overturn the determination by respondent court that the individual defendants enjoy immunity from plaintiffs' damage claims. To continue the theme developed in part I, that determination has been vindicated by recent related developments from the United States Supreme Court.

Insofar as respondent court's determination found against plaintiffs on their claim based upon 42 U.S.C section 1983, that ruling is invulnerable for a reason

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[4] Plaintiffs are correct in noting that the lead opinion in *Jett* was only a plurality opinion signed by four Justices. But while that opinion may fall short of an iron-clad holding, Justice Scalia (who filed a separate opinion "concurring in part and concurring in the judgment") disagreed with the plurality only on a point of methodology. As a matter of practical reality, the *Jett* plurality opinion represents the majority viewpoint of the Court. In any event, and however imperfectly expressed, we think that the *Jett* plurality trumps all of the lower court authorities to the contrary relied upon by plaintiffs.

which could not be anticipated by either the court or the parties. In *Will v. Michigan Dept. of State Police, supra,* ___ U.S. ___ (109 S.Ct. 2304 at pp. 2311-2312), the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983" and therefore cannot face liability for damages. Lesser federal courts have reached the same conclusion with respect to sections 1985 and 1986. (See *Coffin v. South Carolina Dept. of Social Services* (D.S.C. 1983) 562 F.Supp. 579, 585-586 and authorities cited.)

Defendants submitted considerable, uncontradicted evidence in support of their claim that an undisputed material fact was that the "Individual defendants . . . were at all times material to this matter state officials acting in their official capacities under color of State Law." Those defendants can therefore face no liability for monetary damages as to sections 1983, 1985, and 1986.

There remains only plaintiff's cause of action based on section 1981. We believe this particular aspect of the controversy has become moot. If it is assumed that respondent court's ruling was erroneous because it took insufficient account of the factor of the individual defendants' unlawful motive for their actions (see *Gutierrez v. Mun. Ct. of S.E. Judicial Dist.* (9th Cir. 1988) 838 F.2d 1031, 1049-1051), plaintiffs will be unable to recover the damages they seek. As previously established, damages for a violation of section 1981 can be had only pursuant to section 1983 (*Jett v. Dallas Independent School Dist., supra,* ___ U.S. ___ (109 S.Ct. 2702 at pp. 2721-2722), but the individual defendants have immunity against the section

1983 claims because they were acting solely in their official capacities. (*Will v. Michigan Dept. of State Police, supra,* ___ U.S. ___ [109 S.Ct. 2304 at pp. 2311-2312].) In these circumstances mootness is established because no effectual relief could be granted. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 517, p. 499.)

III

The preceding discussion has resolved the issues of plaintiffs' damage claims, and has answered the sole contention of error pressed by plaintiffs. We next address arguments by defendants regarding whether plaintiffs' claims for declaratory and injunctive relief are moot.

Pursuant to a stipulation between the parties, one of the orders filed by respondent court specified that the individual plaintiffs "are no longer seeking declaratory or injunctive relief."[5] Plaintiffs do not dispute this ruling. There consequently seems no point to considering mootness as to those plaintiffs.

Respondent court rejected defendants' claim that the Committee had no standing to seek any kind of relief, but the court's orders restricted the Committee's standing to certain specific aspects of the declaratory and injunctive relief claims regarding the alleged violations of the Administrative Procedure and Open Meeting Acts. Defendants assert that the Committee lacks standing, thus mooting all claims for declaratory and injunctive

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[5] The parties stipulated, and respondent court ordered, that the Committee "is not entitled to any monetary relief for itself or in [*sic*: on] behalf of any other person."

relief. It has been the practice of this court to decide questions of organizational standing only with the benefit of a full record that provides some concrete basis for evaluating inanimate entities. (See *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 892-893; cf. *Environmental Law Fund. Inc. v. Town of Corte Madera* (1975) 49 Cal.App.3d 105.) The soundness of this approach, which implicitly treats the issue as one of fact, appears pertinent here, given that (insofar as can be determined from the limited record presented to us) defendants submitted nothing in the way of supporting evidence required by Code of Civil Procedure section 437c, subdivision (b). As respondent court put it: "The moving papers fail to establish that this alleged unincorporated association . . . lacks standing." Accordingly, we do not believe there is an adequate basis for our deciding as a matter of law that respondent court erred in not terminating the equitable relief aspects of this litigation.

Defendants present a contention which, on paper, constitutes a persuasive argument that the remaining issues of equitable relief have been rendered moot by the enactment of Business and Professions Code section 2122.[6] Respondent court did not address this issue. Its

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[6] The effect of this statute, which figured prominently in the parties' stipulation which underlay one of the May 19th orders, deserves some explanation.

One of the major points of plaintiffs' complaint was that defendants had refused to follow usual practice by appointing a Faculty Committee in Exile, composed of former faculty members of the University of Saigon Medical School, which would evaluate and make recommendations concerning licensing of persons claiming to be graduates of that school. Section

(Continued on following page)

reasons for doing so are unclear. In the first of the May 19th orders the court took pains to make clear that it was expressing "no opinion on any challenge or defense to such declaratory and injunctive relief on the grounds of mootness, irrelevancy or other grounds." In the second of the orders the court stated: "No other issue has been properly presented for summary judgment."

The summary judgment statute seems quite clear about the granting or denial of a motion for summary judgment. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., 437c, subd. (c).) The grounds for denying the motion are clear: (1) the existence of "a triable issue as to one or more material facts" (*id.*, subd. (g)); (2) the moving party's failure to comply with the requirement of "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed . . . [with] reference to the supporting evidence" (*id.*, subd. (b)); (3) "in the discretion of the court, where the only proof of a material fact offered in support of the

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(Continued from previous page)

2122 mandated the creation of such a committee for this purpose and directs that the BMQA licensing division "shall accept the recommendation of the committee, unless the division finds, after notice and opportunity for hearing, that the committee's recommendation is not based upon substantial evidence." (Bus. & Prof. Code, § 2122, subd. (c).) The committee's members were to have been appointed by February 1, 1988. (*id.*, subd. (a).) Section 2122 contains an automatic repeal provision for January 1, 1992. (*id.*, subd. (d).)

summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof" (*id.*, subd. (e)); or (4) "[i]f it appears from the affidavits submitted in opposition . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" (*id.*, subd. (h)).

Following the lead of Division Two, this court has held that "[a] trial court may not refuse to hear a summary judgment motion filed within the time limits of section 437c." (*Sentry Ins. Co. v. Superior Court* (1989) 207 Cal.App.3d 526, 529; see *Wells Fargo Bank v. Superior Court* (1988) 206 Cal.App.3d 918.) A logical corollary of this principle is that a trial court must rule on all aspects of a motion for summary judgment or summary adjudication unless there is ground specified in section 437c for withholding a decision. A trial court is not allowed the luxury of not deciding or of not expressing its opinion, as did respondent court, concerning a matter brought forward in conformity with statutory procedures. It appears from a fair reading of section 437c that a trial court is not permitted to retreat into enigmatic silence or opaque remarks. According to subdivision (g): "Upon the denial of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which

indicates that a triable controversy exists. *The court shall also state its reasons for any other determination.* The court shall record its determination by court reporter or written order." (Emphasis added.)

Respondent court may well have had a valid reason for denying defendants' motion as to this point. Unfortunately, if such a reason exists it is not discernible from the record before us. As the cause will have to be returned to respondent court for entry of a new order, the situation may be clarified at that time.

IV

Defendants' final contention is that respondent court "abused its discretion in refusing to rule" on their application for attorneys' fees pursuant to 42 U.S.C. section 1988. The preceding discussion concerning the flaw in the ruling on defendants' arguments relative to plaintiffs' equitable relief claims is equally applicable to this contention.

In A046101 a peremptory writ of mandate will issue directing respondent court to vacate its orders of May 19, 1988, and enter a new order in conformity with this opinion.

In A046132 the petition for a peremptory writ is denied and the alternative writ is discharged.

Poché, Acting P.J.

WE CONCUR:

Channell, J.

Perley, J.

Bd. of Medical Quality Assurance v. Superior Court
A046101

Le Bup Thi Dao v. Superior Court
A046132

APPENDIX II

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEALS FOR THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Petitioners,

v.

SUPERIOR COURT OF SAN FRANCISCC COUNTY,

Respondent,

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Real Parties in Interest.

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FILED
JAN 5, 1990
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By RON D.
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(San Francisco
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LE BUP THI DAO et al.,

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SUPERIOR COURT OF SAN FRANCISCO COUNTY,

Respondent,

BOARD OF MEDICAL QUALITY ASSURANCE et al.,

Real Parties in Interest.

_____/

A046132
(San Francisco
Super. Ct. No.
876321)

A class action challenging alleged discriminatory licensing practices of the Board of Medical Quality Assurance (BMQA) has produced these petitions demonstrating that virtually everyone involved objects to some aspect of a pair of orders made by respondent court in connection with a motion for summary judgment.[1] For the reasons hereinafter developed, we determine that both sides have some entitlement to relief.

BACKGROUND

The underlying action was initiated by four Vietnamese graduates of the University of Saigon Medical School, joined by the Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States (the Committee).[2] The named defendants were the

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[1] In light of the multiplicity of petitioners and real parties in interest, the parties' trial court designations as plaintiffs and defendants will in the interests of simplicity and clarity be employed throughout this opinion.

[2] With respect to the Committee the complaint alleges it "is an unincorporated association headquartered in Orange County, California. The Committee has filed for incorporation as a non-profit corporation under the laws of the State of California and the matter is pending. The Committee has a dues paying membership of approximately 100 Vietnamese refugees. Said membership is composed of licensed physicians and applicants for medical licensure throughout the United States. The [C]ommittee's organizational purpose is to ensure that its members are provided full and equal access to professional training, employment and licensure in the medical field."

An additional named plaintiff, Catholic Community Services, was dropped as a party plaintiff prior to the summary judgment motion.

BMQA, its Division of Licensing and its Credentials Committee; the Department of Consumer Affairs as "the duly organized and constituted parent agency of BMQA"; and various individuals who occupy official positions with these entities.

The introductory allegations of the complaint provide an overview: "This action is a class action on behalf of foreign medical school graduates from Vietnam ("FMGs") who have been unlawfully denied a license to practice their profession in California by the discriminatory, illegal, arbitrary and unfounded actions of . . . (BMQA) and certain of its members and employees. . . . [¶] BMQA has been and remains engaged in acts and practices to artificially and invidiously deprive large numbers of FMG applicants of a California medical license without regard to competency standards and for anti-competitive, discriminatory and other improper purposes. These acts, many of which are unlawful in and of themselves, include the conduct of secret meetings with agents of the California[] Medical Association and others, discriminatory use of statutory criteria for licensure, falsifying minutes of meetings and other official documents, fabrication of nonexistent criteria for licensure, failure and refusal to follow statutory mandates, avoidance of required administrative procedures, unfounded charges against applicants and refusal to deal fairly and forthrightly with applicants." More particularly, plaintiffs alleged that (1) "defendants at a closed meeting on January 30-31, 1986 decided to suspend processing of all applications for licensure from persons who graduated from Vietnamese medical schools before or after 1975," and (2) at a meeting conducted on June 25-26,

1987, "defendants announced that no post-1975 Vietnamese graduate would receive a license" until such persons "fulfill[ed] new requirements for licensure," thereby "violat[ing] both the California Administrative Procedure Act and the California Open Meeting Law."

Based upon these general allegations, and additional allegations detailing the treatment the four individual plaintiffs received from defendants, plaintiffs set forth causes of action seeking (1) damages and injunctive relief for violation of the Fourteenth Amendment's guarantees of equal protection and due process (2) damages for violation of 42 U.S.C. section 1981 (3) damages for violation of 42 U.S.C. section 1983 (4) damages for violation of 42 U.S.C. section 1985 (5) damages for violation of 42 U.S.C. section 1986 (6) damages for violation of the Administrative Procedure Act (Gov. Code, § 11340 et seq.) and (7) declaratory and injunctive relief for violation of the Open Government Act (Gov. Code, § 11120 et seq.). The substantive portion of the complaint concluded with an omnibus cause of action for declaratory and injunctive relief based upon all matters "hereinbefore alleged."[3]

In due course defendants moved for summary judgment or summary adjudication of issues. The grounds for the motion relevant to these proceedings were that (1) "Plaintiff Committee has no standing to assert the constitutional rights of the individual plaintiffs" (2) "Certain issues and claims in this matter are now moot" and (3)

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[3] Additional causes of action seeking damages for violation of the Unruh Civil Rights Act (Civ. Code, § 51) and the Cartwright Act (Bus. & Prof. Code, § 16720 et seq.) were subsequently dismissed by plaintiffs.

"By reason of immunity, defendants are not liable for suit for violation of 42 U.S.C. sections 1981, 1983, 1985 or 1986." As part of their motion defendants also sought an award of costs, including attorneys fees, pursuant to 42 U.S.C. section 1988.

After receiving voluminous papers, prodding the parties into narrowing the areas of dispute by stipulation, and conducting two hearings on the motion, respondent court made two orders (both filed on May 19, 1989) in which it ruled that (1) pursuant to stipulation plaintiffs' claims based upon 42 U.S.C. section 1983, 1985, and 1986, were dismissed as against the institutional defendants (2) by reason of a split of authority the institutional defendants were not entitled to summary judgment on the claim based upon 42 U.S.C. section 1981 (3) the individual defendants were clothed with "qualified immunity" against all of plaintiffs' claims (4) the Committee had standing but only to pursue claims for declaratory and injunctive relief, not damages, by reason of the enactment of Business and Professions Code section 2122, and (5) "[n]o other issue has been properly presented for summary adjudication."

Unhappy with these determinations, plaintiffs and defendants each filed a petition for extraordinary mandamus relief. Alternative writs were issued.

REVIEW

Our usual practice in dealing with situations where both sides are unhappy with trial court rulings, orders, or judgments is to deal with the points raised by one side before progressing to the points urged by the other side.

With these petitions, however, we have determined that the most logical analytical progression requires some interlineation of the contentions advanced by the parties.

I

We first turn to defendants petition (AO46101). Respondent court ruled, and plaintiffs do not dispute, that the state agencies named in the complaint have immunity from suit for purposes of 42 U.S.C. sections 1983, 1985, and 1986. The ruling that comparable immunity did not extend to section 1981 may have been correct at the time (cf. *Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 Cal.App.3d 1023, 1035, fn. 12 [finding no immunity] and *Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1988) 861 F.2d 198, 201 [finding immunity]); it has, however, been overtaken by several very recent decisions of the United States Supreme Court.

Section 1981 provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

In *Patterson v. McLean Credit Union* (1989) ___ U.S. ___ (109 S.Ct. 2363), the court held that the remedial ambit of section 1981 is confined to situations where a contract is at issue: "The most obvious feature of the provisions is the restriction of its scope to forbidding discrimination in

the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, § 1981 provides no relief." (*Id.* at p. ___ [109 S.Ct. 2363 at p. 2372].) More pertinently, in *Jett v. Dallas Independent School Dist.* (1989) ___ U.S. ___ (109 S.Ct. 2702), the court held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." (*Id.* at p. ___ [109 S.Ct. 2702 at pp. 2721-2722].)[4]

Plaintiffs invoked section 1981 solely in connection with one of their claims for damages alleged in their complaint. There is absolutely nothing in plaintiffs' complaint giving the slightest hint that their dispute with defendants rests upon anything resembling a contractual basis. Absent the contractual foundational specified by *Patterson*, the only damages claim plaintiffs can assert is required by *Jett* to be brought pursuant to section 1983. The fly in the ointment is that section 1983 does not apply to claims against a State. (*Will v. Michigan Dept. of State Police* (1989) ___ U.S. ___ [109 S.Ct. 2304]; see *Pyne v.*

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[4] Plaintiffs are correct in noting that the lead opinion in *Jett* was only a plurality opinion signed by four Justices. But while that opinion may fall short of an iron-clad holding, the ultimate opinion of the plurality opinion does seem to be closer to the views of Justice Scalia (who filed a separate opinion "concurring in part and concurring in the judgment") than the four dissenting Justices. In any event, and however imperfectly expressed, we think that the *Jett* plurality trumps all of the lower court authorities to the contrary relied upon by plaintiffs.

Meese (1985) 172 Cal.App.3d 292, 401-403.) We therefore agree with those defendants comprising units of the State of California that they are entitled to summary judgment on the cause of action plaintiffs purported to base on section 1981.

Plaintiffs' arguments against this conclusion are not persuasive. We do agree with plaintiffs that much of defendants' analysis based upon the Eleventh Amendment to the United States Constitution is essentially beside the point because that amendment does not apply in state court actions. (*Will v. Michigan Dept. of State Police, supra,* ___ U.S. ___ [109 S.Ct. 2304 at p. 2307].) The very decision relied upon by plaintiffs for the proposition that "California authority on the issue of whether state agencies are subject to suit under 42 U.S.C. Section 1981 is unequivocal: they are" expressly recognizes that "[w]here the Supreme Court of the United States interprets a statute enacted by the Congress, that interpretation is binding upon the state courts of California." (*Filipino Accountants' Assn. v. State Bd. of Accountancy, supra,* 155 Cal.App.3d 1023 at p. 1034.) The *Patterson, Jett,* and *Will* decisions deal with the substantive content and scope of the federal statutes plaintiffs invoke. Our discussion has followed what we believe are the salient aspects of those decisions without regard to the status of the forum where claims such as plaintiffs' are commenced. Considerations of the Eleventh Amendment have consequently played no part in our analysis.

With the institutional defendants now absolved of plaintiffs' damage claims, we next consider whether a similar conclusion extends to the individual defendants.

II

In their petition (AO46132) plaintiffs ask us to overturn the determination by respondent court that the individual defendants enjoy immunity from plaintiffs' damage claims.

This is what respondent court ruled: "Insofar as the motion requests an adjudication that the individual defendants are entitled to immunity from the various claims that have been asserted against them, the motion will be GRANTED. . . . [¶] [T]he uncontroverted facts do establish the right to qualified immunity. The defendants' actions in insisting upon additional verification of the adequacy of the curriculum at the University of Saigon Medical School, as described in the voluminous declarations and deposition transcripts without material contradiction (as distinguished from the manner in which those actions are characterized in the legal argument of counsel) must 'reasonably be thought consistent with the rights' defendants are alleged to have violated. *Anderson v. Creighton* (1987), ___ U.S. ___, 107[] S.Ct. 3034, 3038. The defendants are shielded from liability for damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818; *Little v. City of Seattle* (9th Cir. 1988), 863 F.2d 681. There simply is no basis to conclude that the defendants did not believe and could not reasonably have believed they were acting properly in demanding confirmation of the post-1975 Saigon curriculum as they did.

"With respect to the claim that defendants violated plaintiffs' constitutional rights and 42 U.S.C. section 1981

by basing their actions upon impermissible racial or ethnic factors, qualified immunity is not established unless this allegation has been negated. *Guiterrez [sic: Gutierrez] v. Municipal Court of S.E. Judicial Dist.* (9th Cir. 1988) 838 F.2d 1031, 1049-1051 *vacated as moot*, 57 U.S.L.W. 3687 (1989). However, the declarations of the moving parties do negate this allegation, and the opposing evidence cited by the plaintiffs is not sufficient to raise a triable issue of fact concerning this material issue. (See, e.g., Plaintiffs' Response to Defendants' Statement of Undisputed Facts, response to Defendants' Fact #31-32.)"

Respondent court cited the most recent views of the United States Supreme Court on what it takes to establish qualified official immunity. "When government officials abuse their offices, 'action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees.' [Citation.] On the other hand, permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. [Citation.] Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 341 [] (1986) (qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law'). . . . Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for

an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action [citation] assessed in light of the legal rules that were 'clearly established' at the time it was taken [citation]." (*Anderson v. Creighton* (1987) 483 U.S. 635, 638-639.)

In *Gutierrez v. Mun. Ct. of S.E. Judicial Dist., supra,* 838 F.2d 1031, the Ninth Circuit adopted principles formulated by the District of Columbia Circuit and stated: "We hold . . . that where the lawfulness of a challenged act is dependent upon the actor's motive or intent, the purpose for which the act was undertaken must be analyzed and not just the act itself. We also hold that in deciding whether a defendant is entitled to qualified immunity in cases in which unlawful motive is a critical element, the court must consider the actor's intent in carrying out the act that is alleged to have resulted in the violation of the plaintiff's rights. Specifically, we . . . agree . . . that qualified immunity is not a defense in cases involving intentional racial or other similar discrimination, including national origin." (*Id.* at pp. 1049-1051.)

That portion of respondent court's ruling finding qualified immunity for "defendants' actions in insisting upon additional verification of the adequacy of the curriculum at the University of Saigon Medical School" cannot be reconciled with *Gutierrez* because it focuses upon the objective reasonableness of the actions without regard for defendants' motives or intents in doing so. Defendants' actions may well have been objectively reasonable for a regulatory authority acting in so important an area as physician licensing. There can be no dispute that "unlawful motive," in the form of "intentional racial . . . discrimination" by defendants, "is a critical

element" of the causes of action plaintiffs have founded upon federal statute and constitutional provision. (See *Gutierrez v. Mun. Ct. of S.E. Judicial Dist., supra,* 838 F.2d 1031 at p. 1047; *Springer v. Seamen* (1st Cir. 1987) 821 F.2d 871, 880.) Notwithstanding the specific holding of *Gutierrez* that "qualified immunity is not a defense in cases involving intentional racial or other similar discrimination," which alone suffices to end this discussion, the remainder of the basis for the ruling is also flawed because the parties submitted a wealth of conflicting evidence concerning this material issue. It thus appears that with the exception of the claim based upon 42 U.S.C. section 1981, whose underpinnings have been obliterated by *Patterson v. McLean Credit Union, supra,* ___ U.S. ___ (109 S.Ct. 2363), the ruling on qualified immunity of the individual defendants cannot stand.

III

The preceding discussion has established the validity of damage claims based upon 42 U.S.C. sections 1983, 1985, and 1986, and has answered the sole contention of error pressed by plaintiffs. We next address arguments by defendants regarding whether plaintiffs' claims for declaratory and injunctive relief are moot.

Pursuant to a stipulation between the parties, one of the orders filed by respondent court specified that the individual plaintiffs "are no longer seeking declaratory or injunctive relief."[5] Plaintiffs do not dispute this ruling.

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[5] The parties stipulated, and respondent court ordered, that the Committee "is not entitled to any monetary relief for itself or in [*sic*: on] behalf of any other person."

There consequently seems no point to considering mootness as to those plaintiffs.

Respondent court rejected defendants' claim that the Committee had no standing to seek any kind of relief, but the court's orders restricted the Committee's standing to certain specific aspects of the declaratory and injunctive relief claims regarding the alleged violations of the Administrative Procedure and Open Meeting Acts. Defendants assert that the Committee lacks standing, thus mooting all claims for declaratory and injunctive relief. It has been the practice of this court to decide questions of organizational standing only with the benefit of a full record that provides some concrete basis for evaluating inanimate entities. (See *McKeon v. Hastings College* (1986) 185 Cal.App.3d 877, 892-893; cf. *Environmental Law Fund, Inc. v. Town of Corte Madera* (1975) 49 Cal.App.3d 105.) The soundness of this approach, which implicitly treats the issue as one of fact, appears pertinent here, given that (insofar as can be determined from the limited record presented to us) defendants submitted nothing in the way of supporting evidence required by Code of Civil Procedure section 437c, subdivision (b). As respondent court put it: "The moving papers fail to establish that this alleged unincorporated association . . . lacks standing." Accordingly, we do not believe there is an adequate basis for our deciding as a matter of law that respondent court erred in not terminating the equitable relief aspects of this litigation.

Defendants present a contention which, on paper, constitutes a persuasive argument that the remaining issues of equitable relief have been rendered moot by the enactment of Business and Professions Code section

2122.[6] Respondent court did not address this issue. Its reasons for doing so are unclear. In the first of the May 19th orders the court took pains to make clear that it was expressing "no opinion on any challenge or defense to such declaratory and injunctive relief on the grounds of mootness, irrelevancy or other grounds." In the second of the orders the court stated: "No other issue has been properly presented for summary judgment."

The summary judgment statute seems quite clear about the granting or denial of a motion for summary judgment. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The grounds for denying the motion are clear: (1) the existence of "a triable issue as to one or more

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[6] The effect of this statute, which figured prominently in the parties' stipulation which underlay one of the May 19th orders, deserves some explanation.

One of the major points of plaintiffs' complaint was that defendants had refused to follow usual practice by appointing a Faculty Committee in Exile, composed of former faculty members of the University of Saigon Medical School, which would evaluate and make recommendations concerning licensing of persons claiming to be graduates of that school. Section 2122 mandated the creation of such a committee for this purpose and directs that the BMQA licensing division "shall accept the recommendation of the committee, unless the division finds, after notice and opportunity for hearing, that the committee's recommendation is not based upon substantial evidence." (Bus. & Prof. Code, § 2122, subd. (c).) The committee's members were to have been appointed by February 1, 1988. (*Id.*, subd. (a).) Section 2122 contains an automatic repeal provision for January 1, 1992. (*Id.*, subd. (d).)

material facts" (*id.*, subd. (g)); (2) the moving party's failure to comply with the requirement of "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed . . . [with] reference to the supporting evidence" (*id.*, subd. (b)); (3) "in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof" (*id.*, subd. (e)); or (4) "[i]f it appears from the affidavits submitted in opposition . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented" (*id.*, subd. (h)).

Following the lead of Division Two, this court has held that "[a] trial court may not refuse to hear a summary judgment motion filed within the time limits of section 437c." (*Sentry Ins. Co. v. Superior Court* (1989) 207 Cal.App.3d 526, 529; see *Wells Fargo Bank v. Superior Court* (1988) 206 Cal.App.3d 918.) A logical corollary of this principle is that a trial court must rule on all aspects of a motion for summary judgment or summary adjudication unless there is ground specified in section 437c for withholding a decision. A trial court is not allowed the luxury of not deciding or of not expressing its opinion, as did respondent court, concerning a matter brought forward in conformity with statutory procedures. It appears from a fair reading of section 437c that a trial court is not permitted to retreat into enigmatic silence or opaque remarks. According to subdivision (g): "Upon the denial

of a motion for summary judgment, on the ground that there is a triable issue as to one or more material facts, the court shall, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination shall specifically refer to the evidence proffered in support of and in opposition to the motion which indicates that a triable controversy exists. *The court shall also state its reasons for any other determination.* The court shall record its determination by court reporter or written order." (Emphasis added.)

Respondent court may well have had a valid reason for denying defendants' motion as to this point. Unfortunately, if such a reason exists it is not discernible from the record before us. As the cause will have to be returned to respondent court for entry of a new order, the situation may be clarified at that time.

IV

Defendants' final contention is that respondent court "abused its discretion in refusing to rule" on their application for attorneys' fees pursuant to 42 U.S.C. section 1988. The preceding discussion concerning the flaw in the ruling on defendants' arguments relative to plaintiffs' equitable relief claims is equally applicable to this contention.

A peremptory writ of mandate will issue directing respondent court to vacate its orders of May 19, 1988, and

enter a new order in conformity with this opinion. All parties shall bear their respective costs.

Poché, Acting P.J.

WE CONCUR:

Channell, J.

Perley, J.

Bd. of Medical Quality Assurance v. Superior Court
A046101

Le Bup Thi Dao v. Superior Court
A046132

APPENDIX III

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER EIGHT

DR. LE BUP THI DAO, et al., Plaintiffs, vs. BOARD OF MEDICAL QUALITY ASSURANCE OF THE STATE OF CALIFORNIA, et al., Defendants.	NO. 876 321 ORDER RE SUMMARY ADJUDICATION OF ISSUES ENDORSED FILED San Francisco County Superior Court MAY 19 1989 DONALD W. DICKINSON, Clerk BY: JERRY L. WASHINGTON Deputy Clerk

Defendants' Motion for Summary Judgment and for Attorneys' Fees under 42 U.S.C. section 1988, or in the Alternative Summary Adjudication of the Issues, as subsequently limited and restated, is ruled upon as follows.

Insofar as the motion requests an adjudication that the institutional (or "organizational") defendants are entitled to sovereign immunity from suit under 42 U.S.C. section 1981, the motion is DENIED. There admittedly is a split of authority as to whether state agencies are immune from suit under section 1981. Compare, e.g., *Yarbrough v. Illinois Dept. of Mental Health* (N.D. Ill. 1982),

538 F.Supp. 414, with *Malone v. Schenk* (C.D. Ill. 1985), 638 F.Supp. 423. *Yarbrough* and *Skyers v. Port Authority of N.Y. And N.J.* (S.D.N.Y. 1976), 431 F.Supp. 79, 83, on which it relied, recognize that whether Congress intended to override state immunity under the Eleventh Amendment (which Congress is authorized to do by both the Thirteenth and Fourteenth Amendments) must be evaluated separately for section 1981, which was adopted as part of the Civil Rights Act 1866 under the authority of the Thirteenth Amendment, and for section 1983, which was adopted as part of the Ku Klux Klan Act of 1871 under the Authority of the Fourteenth Amendment. Both cases concluded that section 1981 was intended to encompass state agencies as "persons" subject to judicial enforcement of its provisions. The court in *Malone* agreed that the legislative history of section 1981 indicated "that Congress fully intended to reach the governmental acts of the states with the Civil Rights Act of 1866," 638 F.Supp. at 428, but felt that under *Atascadero State Hospital v. Scanlon* (1985), 473 U.S. 234, state immunity exists unless "the statutue in its language unmistakenly abrogate(s) the state's Eleventh Amendment immunity," *ibid.*, and that the decisions in *Yarbrough* and *Skyers* had been "implicitly disapproved by the holding in *Atascadero.*" *id.* at 429. However, *Atascadero* held only that section 504 of the Rehabilitation Act of 1973 was not intended to override Eleventh Amendment immunity: it did not purport to modify the basic principle that the meaning of each federal statutue must be determined separately and that properly evidenced Congressional intent may be considered in determining the meaning of the words of the

statute. Since *Malone* itself recognized the apparent intention of Congress to apply section 1981 to the states, it would seem that *Yarbrough* and *Skyers* reached the correct conclusion that the statute overrides the state's immunity. Compare *Chavez-Salido v. Cabell* (C.D. Calif. 1977), 427 F.Supp. 158, 162-165; *Sethy v. Alameda Co. Water Dist.* (9th Cir. 1976), 545 F.2d 1157, 1159-1160; *Mahone v. Waddle* (3rd Cir. 1977), 564 F.2d 1018, 1030-1037. In all events, since the single California appellate decision addressing this issue has stated that state agencies are subject to suit under section 1981, *Filipino Accountants' Assn. v. State Board of Accountancy* (1984), 155 Cal.App.3d 1023, 1035 n. 12, that is the view which this court should follow.

Whether the evidence is sufficient to support the cause of action under section 1981 against the organizational defendants is not an issue which has been properly presented by the pending motion.

Insofar as the motion requests an adjudication that the individual defendants are entitled to immunity from the various claims that have been asserted against them, the motion will be GRANTED. There is authority that arguably supports the conclusion that the individual defendants are entitled to absolute immunity from liability for their respective roles in refusing to accept for the purpose of licensure the adequacy of of [sic] the curriculum at the University of Saigon Medical School after 1975, and for delaying the issuance to plaintiffs of licenses to practice medicine in California. See, e.g., *Horwitz v. Board of Medical Examiners of State of Colorado* (10th Cir. 1987), 822 F.2d 1508; *Vakas v. Rodriguez* (10th Cir. 1984), 728 F.2d 1293; *Greene v. Zank* (1984), 158 Cal.App.3d 497. However, the uncontroverted facts fail to establish

that the functions performed by defendants were sufficiently judicial in nature to warrant quasi-judical absolute immunity. See, e.g., *Cleavinger v. Saxner* (1985), 474 U.S. 193; *Schlegal v. Bebout* (9th Cir. 1987), 841 F.2d 937, 941-944. Neither has a basis for quasi-legislative absolute immunity been established.

Nonetheless, the uncontroverted facts do establish the right to qualified immunity. The defendants' actions in insisting upon additional verification of the adequacy of the curriculum at the University of Saigon Medical School, as described in the voluminous declarations and deposition transcripts without material contradiction (as distinguished from the manner in which those actions are characterized in the legal argument of counsel) must "reasonably be thought consistent with the rights" defendants are alleged to have violated. *Anderson v. Creighton* (1987), ___ U.S. ___, 107A S.Ct. 3034, 3038. The defendants are shielded from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818; *Little v. City of Seattle* (9th Cir. 1988), 863 F.2d 681. There simply is no basis to conclude that the defendants did not believe and could not reasonably have believed they were acting properly in demanding confirmation of the post-1975 Saigon curriculum as they did.

With respect to the claim that defendants violated plaintiffs' constitutional rights and 42 U.S.C. section 1981 by basing their actions upon impermissible racial or ethnic factors, qualified immunity is not established unless this allegation has been negated. *Guitierrez v. Municipal Court of S.E. Judicial Dist.* (9th Cir. 1988), 838 F.2d 1031,

1049-1051 *vacated as moot*, 57 U.S.L.W. 3687 (1989). However, the declarations of the moving parties do negate this allegation, and the opposing evidence cited by the plaintiffs is not sufficient to raise a triable issue of fact concerning this material issue. (See, e.g., Plaintiff's Response to Defendants' Statement of Undisputed Facts, response to Defendants' Fact #31-32.)

While it may be that the refusal of the defendants to have granted plaintiffs' licenses before the recent statutory amendments was unjustifiable, judicial remedies were available to have corrected any possible abuses of discretion. Assuming, arguendo, that there were such abuses and that they affected plaintiffs' constitutional rights, it does not follow that the individual board members and staff bear personal liability. The defendants' evidence does reflect facts establishing the existence of a qualified immunity as a matter of law, and, however sympathetic one may be with the predicament in which the plaintiffs found themselves, plaintiffs' evidence fails to create a triable issue concerning those facts.

Insofar as the defendants' motion requests an adjudication that the Committee for the Professional Rights of Vietnamese Refugee Physicians in the United States lacks standing to seek declaratory and injunctive relief herein, the motion is DENIED. The moving papers fail to establish that this alleged unincorporated association (First Amended Complaint of Course paragraph 6(b)) lacks standing.

No other issue has been properly presented for summary adjudication.

DATED: May 19, 1989.

STUART R. POLLAK
STUART R. POLLAK
Judge of the Superior Court